86 1779

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN B. DUNKLE, as Clerk of the Circuit Court, Fifteenth Judicial Circuit of Florida, and **PALM BEACH COUNTY, FLORIDA**,

Petitioners

vs.

CAMDEN I CONDOMINIUM ASSOCIATION, INC.; CAMDEN L CONDOMINIUM ASSOCIATION, INC.; CAMBRIDGE A CONDOMINIUM ASSOCIATION, INC.; CAMBRIDGE I CONDOMINIUM ASSOCIATION, INC.; CAMBRIDGE F CONDOMINIUM ASSOCIATION, INC.; CHATHAM A CONDOMINIUM ASSOCIATION, INC.; CHATHAM M CONDOMINIUM ASSOCIATION, INC.; COVENTRY A CONDOMINIUM ASSOCIATION, INC.; COVENTRY J CONDOMINIUM ASSOCIATION, INC.; DORCHESTER E CONDOMINIUM ASSOCIATION, INC.; KENT D CONDOMINIUM ASSOCIATION, INC.; KENT J CONDOMINIUM ASSOCIATION, INC.; SALISBURY D CONDOMINIUM ASSOCIATION, INC.; SALISBURY E CONDOMINIUM ASSOCIATION, INC.; SOMERSET A CONDOMINIUM ASSOCIATION, INC.; SOMERSET C CONDOMINIUM ASSOCIATION, INC.; SOMERSET H CONDOMINIUM ASSOCIATION, INC.; SOMERSET I CONDOMINIUM ASSOCIATION, INC.; WALTHAM E CONDOMINIUM ASSOCIATION, INC.; WALTHAM H CONDOMINIUM ASSOCIATION, INC.; and WINDSOR N CONDOMINIUM ASSOCIATION, INC., all Florida corporations not for profit,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RICHARD A. GRADDOCK
Chief Deputy County Attorney
Post Office Box 1989
West Palm Beach, Florida 33402
(305) 820-2255
For Petitioner
PALM BEACH COUNTY

JOHN RANDOLPH, of
Johnston, Sasser, Randolph
& Weaver
Post Office Box M
West Palm Beach, Florida 33402
(305) 655-0108
For Petitioner DUNKLE

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

Whether the Court of Appeals erred holding that the District Court could not dismiss Respondents' complaint on Petitioners' motion without first conducting an evidentiary hearing on whether retroactive application of this Court's decision in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) would cause substantial inequitable results.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

CASES PAGE(s)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN B. DUNKLE, as Clerk of the Circuit Court, Fifteenth Judicial Circuit of Florida, and **PALM BEACH COUNTY, FLORIDA**,

Petitioners

vs.

CAMDEN I CONDOMINIUM ASSOCIATION, INC.; CAMDEN L CONDOMINIUM ASSOCIATION, INC.; CAMBRIDGE A CONDOMINIUM ASSOCIATION, INC.; CAMBRIDGE I CONDOMINIUM ASSOCIATION, INC.; CAMBRIDGE F CONDOMINIUM ASSOCIATION, INC.; CHATHAM A CONDOMINIUM ASSOCIATION, INC.; CHATHAM M CONDOMINIUM ASSOCIATION, INC.; COVENTRY A CONDOMINIUM ASSOCIATION, INC.; COVENTRY J CONDOMINIUM ASSOCIATION, INC.; DORCHESTER E CONDOMINIUM ASSOCIATION, INC.; KENT D CONDOMINIUM ASSOCIATION, INC.; KENT J CONDOMINIUM ASSOCIATION, INC.; SALISBURY D CONDOMINIUM ASSOCIATION, INC.; SALISBURY E CONDOMINIUM ASSOCIATION, INC.; SOMERSET A CONDOMINIUM ASSOCIATION, INC.; SOMERSET C CONDOMINIUM ASSOCIATION, INC.; SOMERSET H CONDOMINIUM ASSOCIATION, INC.; SOMERSET I CONDOMINIUM ASSOCIATION, INC.; WALTHAM E CONDOMINIUM ASSOCIATION, INC.; WALTHAM H CONDOMINIUM ASSOCIATION, INC.; and WINDSOR N CONDOMINIUM ASSOCIATION, INC., all Florida corporations not for profit,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue from this Court to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit, Case No. 86-5144, rendered in these proceedings on December 18, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in this case is reported below at 805 F.2d 1532, and also appears in Appendix A hereof, at pages AA,A-1 through AA,A-8. The Court of Appeals' order denying the Petition for Rehearing by Original Panel is unreported and appears in Appendix B hereof, at pages AB,A-9. The Court of Appeals order denying the Petition for Rehearing en Banc is also unreported and appears in Appendix B hereof, at pages AB,A-10 through AB,A-11. The Order of Dismissal entered by the United States District Court for the Southern District of Florida is also unreported and appears in Appendix C hereof, at pages AC,A-12 through AC,A-15.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was entered on December 18, 1986. Petitioners timely filed a Petition for Rehearing by Original Panel and a Petition for Rehearing en Banc. On January 28, 1987, the Court of Appeals

entered orders denying both such petitions. This Petition for a Writ of Certiorari is filed within ninety (90) days of the orders denying such petitions for rehearing, and the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

In 1973, the Florida legislature enacted certain amendments to Section 28.33, Florida Statutes. These amendments basically empowered clerks of Florida circuit courts (trial courts) to place into interest-bearing bank accounts funds deposited into the registry of the courts, and provided that interest earned in this fashion would be deemed income of the offices of said clerks.

Respondents before this Court were the plaintiffs below. They originally filed these proceedings in 1981 in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Their complaint alleged in substance that they had been litigants in Palm Beach County courts and during the course of the litigation they had deposited into the registry of the court certain sums of money. They sought to recover interest earned thereon when Petitioner DUNKLE invested the funds in interest-bearing accounts pursuant to the provisions of Section 28.33, Florida Statutes, then in effect.

At the same time, Respondents' attorneys were representing other plaintiffs similarly situated in litigation in Broward County, Florida, seeking the same relief on the same basis against the clerk of the circuit court in that county. On November 24, 1982, the District Court of Appeal of Florida, Fourth District, in the case of *International*

Studio Apartment Association v. Lockwood, 421 So.2d 1119 (Fla. Dist. Ct. App. 1982), *petition for review denied*, 430 So.2d 451 (Fla.), *cert denied*, 464 U.S. 895, 104 S.Ct. 244, 78 L.Ed.2d 233 (1983), affirmed the trial court's order dismissing the complaint of plaintiffs therein, with prejudice. The Fourth Appellate District of Florida encompasses Palm Beach County as well as Broward County.

Essentially, plaintiffs in the *Lockwood* litigation as well as plaintiffs below (Respondents before this Court) were seeking a judicial declaration or determination that this Court's decision in the case of *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) should be applied retroactively. (The *Lockwood* decision is reproduced herein in Appendix D at pages AD,A-17 through AD,A-24.) In *Webb's*, this Court held that the provisions of Section 28.33, Florida Statutes, to which reference has hereinabove been made, were unconstitutional because they permitted a governmental taking of private property. (Subsequently, the Florida legislature amended Section 28.33 to eliminate the language held constitutionally infirm by this Court in *Webb's.)* The *Lockwood* court held that *Webb's* should not be retroactively applied.

Shortly after the rendition of the decision of the Florida appellate court in *Lockwood*, Respondents voluntarily dismissed their action in the Palm Beach County circuit court and instituted the instant proceedings in the United States District Court for the Southern District of Florida, seeking essentially the same relief as their proceedings in state court had sought. The bases alleged in their complaint for federal jurisdiction in this federal court of first instance were 28 *U.S.C.* §§ 1343(3)(4) [sic] 1331,

2201, and 2202; 42 *U.S.C.* §§ 1985, 1983 [sic]; and the Fifth and Fourteenth Amendments to the Constitution of the United States.

Petitioners eventually filed below a motion to dismiss and motion to strike on the ground, *inter alia*, that Respondents had failed to state a claim upon which relief could be granted. The two primary bases for this contention were (1) that *Lockwood* had decided the issue in this case adversely to Respondents and (2) that there was no unconstitutional taking in this case.

Respondents on July 17, 1983 filed a memorandum of law responding to these motions. In said response, Respondents purported or attempted to apply the relevant factors of so-called "retroactivity analysis" stated by this Court in *Chevron Oil Co., v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

On January 30, 1986, Chief United States District Judge James Lawrence King entered an order granting Petitioners' motion to dismiss with prejudice. Judge King analyzed the case in light of the *Chevron* factors and concluded that *Webb's* was not to be retroactively applied. The three *Chevron* factors are: (1) whether the decision establishes a new principle of law, either by overruling clear past precedent on which the litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) considering the history of the rule in question and its purpose and effect, whether retroactive application would further or retard the operation of the rule; and (3) whether retroactive application could produce substantial inequitable results and injustice and hardship for one of the parties.

Judge King found that the first prong of the *Chevron* test had been satisfied because Petitioners had reasonably relied upon the validity of the statute and Respondents had made no claim to interest earned on the moneys which they had deposited into the registry of the court until well after the conclusion of the litigation in which said moneys were deposited. He further concluded that the constitutional protection afforded to Respondents under the Fifth and Fourteenth Amendments to the Constitution of the United States would not be furthered or retarded by retroactive application of *Webb's*, and thus the second prong of the *Chevron* test had been met. As to the third prong of the *Chevron* test, the District Court concluded:

> . . . Finally it could well work a hardship on the court clerk if the monies were required to be returned at this time. The money would never have been earned but for the statute and it is long past spent. The Plaintiff[s] failed to raise the issue of the interest in the state court and [are] in the exact position they would have been in had the statute not been in [e]ffect. The statute has now been held invalid and all future depositors are thus protected.

(Bracketed material supplied to correct apparent errors in original.)

Respondents then appealed to the Court of Appeals and both parties filed briefs. On December 18, 1986, the Court of Appeals vacated the order of dismissal and remanded for further proceedings. Noting that the party seeking to avoid retroactive application has the burden of persuasion, the Court of Appeals proceeded to analyze the case in light of the three *Chevron* factors.

As to the first, the Court of Appeals said that while it may not have been wholly unreasonable for Petitioners to rely upon the presumptively-constitutional statutory authority in collecting and keeping interest on registry deposits, nonetheless this Court's opinion in *Webb's* did not overrule any federal court precedent nor was the holding in that case not clearly foreshadowed.

As to the second *Chevron* factor, the Court of Appeals observed that when Petitioners and others spent money received under Section 28.33, they spent money which was not theirs. "It is not sufficient that current or future depositors will not lose money," the court said. Rather, "[t]he best way to further the *Beckwith* ruling is to restore already confiscated money to those people to whom the Supreme Court has said it belongs." 805 F.2d at 1535.

As to the third factor -- whether retroactivity would cause substantial inequitable results -- the Court of Appeals stated that this factor would determine whether *Webb's* was to be applied only prospectively, because the other two factors of the *Chevron* test "weigh lightly for prospective application. . . ." Observing that the District Court had held that it could well work a hardship on Petitioners if the moneys were required to be returned at this point in time, the Court of Appeals also noted that the District Court had held no hearing on the matter and that there was no evidence in the record supporting this conclusion. The Court of Appeals stated:

> We recognize that repayment of the interest might impose a heavy burden, not only on Palm Beach County, but on every other county in Florida. The interest provisions of the pertinent statutes have [sic--had?] been in effect for many

> years. In this case alone, plaintiffs claim that they are due a refund in excess of one million dollars. A holding of retroactivity in this case would likely prompt similar writs involving similar claims throughout Florida.
>
> Some potential economic hardship, however, would not necessarily preclude retroactive application of *Beckwith*. Retroactive application is precluded only when necessary to prevent *substantial* inequity. . . .
>
> Defendants have presented no evidence of substantial inequities, and we decline to allow the important issue in this case to be decided on the basis of unsubstantiated speculation. We anticipate that the risk of insolvency for local government, the risk of deep cuts in government services necessary to innocent citizens, and the risk of overtaxing innocent taxpayers are critical inquiries in this case; but other matters may also be relevant.
>
> Accordingly, we VACATE the judghment of the district court and REMAND this case for consideration of the burden that retroactive application of *Beckwith* would place, in fact on Florida local governments and for other proceedings consistent with this opinion.

805 F.2d at 1535 (citations omitted, bracketed language supplied, emphasis in original).

Petitioners thereafter timely filed this Petition for a Writ of Certiorari seeking review of the decision of the Court of Appeals below.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH A STATE COURT OF LAST RESORT.

Under Florida law, the state's district courts of appeal are, as they were intended to be when they were created, final appellate courts and not intermediate appellate court. *Johns v. Wainwright,* 253 So.2d 873 (Fla. 1971); *Karlin v. City of Miami Beach,* 113 So.2d 551 (Fla. 1959); *Ansin v. Thurston,* 101 So.2d 808 (Fla. 1958). As such, they are, except in narrow and limnited circumstances (none of which applies here), truly state courts of last resort. As a result of this rule, the decision of Florida's Fourth District Court of Appeal in *International Studio Apartment Association v. Lockwood,* 421 So.2d 1119 (Fla. Dist. Ct. App. 1982), *petition for review denied,* 430 So.2d 451 (Fla.), *cert.denied,* 464 U.S. 895, 104 S.Ct. 244, 78 L.Ed.2d 233 (1983), was a decision of state court of last resort. To be sure, subject to an exception not applicable to the facts of this case, all trial courts within the State of Florida were bound to follow the precedent extablished by *Lockwood* unless and until the Supreme Court of Florida overruled or modified it.

The issue before the Florida appellate court in *Lockwood* was precisely the same as that before the District Court in the case *sub judice.* The facts were, for all intents and purposes, identical. The only differences were the names of the parties and the political subdivision of the state in which the actions arose. In considering whether this Court's *Webb's* decision should be applied only prospectively, the Florida court utilized the analysis

employed by Florida courts as well as the federal *Chevron* test and reached the same result: that *Webb's* should *not* be applied retroactively.

Before going into the three *Chevron* factors, the Florida court first observed:

> [T]here is at least a hint in the Florida Supreme Court's earlier decision upholding the constitutionality of the statute that at least that court (Florida Supreme Court) would apply such a ruling only prospectively. The trial court in *Webb's* invalidated the statute. Upon direct appeal the Florida Supreme Court reversed the trial court and upheld the statute. Interestingly, in doing so, the court specifically ruled that its decision would "apply in this case and in all cases where deposits of funds are made after the effective date of this opinion." In other words the ruling was given prospective effect only. Although no reasons were given for doing so, it seems apparent that the court was concerned that others may have relied on the trial court ruling invalidating the statute. Surely, if persons who have relied on the invalidity of a state statute are to be protected, it would make no sense to afford less protection to those who have acted in good faith reliance on the validity of the statute.

421 So.2d at 1121.

The Florida court then proceeded to analyze and apply the three *Chevron* factors, and it is in this analysis that the decision below of the Eleventh Circuit Court of Appeals conflicts with that of the state court of last resort. The Florida court stated that the litigants had relied upon the statute, Section 28.33, "without question" and thus its

unconstitutionality was an issue of first impression (in *Webb's*) whose resolution was not clearly foreshadowed. The court observed that the clerk of the court had, pursuant to the statute, invested funds deposited into the court registry and, also in reliance upon the statute, had retained the interest earned and used it for the operation of his office, turning over any balance to the county.

By contrast, the Court of Appeals below noted that while it may not have been "wholly unreasonable" for the clerk of court to rely upon the presumptively-constitutional statute (which had, in fact, been upheld by the Supreme Court of Florida), nonetheless the statute did not *require* the clerk to invest the funds and appropriate the interest but only *authorized* him to do so. As a result, the Court of Appeals reasoned, the clerk "assumed the risk" that the statute would ultimately be found unconstitutional. The Court of Appeals noted further that the Supreme Court of North Carolina in 1964 and Supreme Court of Texas in 1972 had found similar statutes constitutionally infirm. The Court of Appeals also said that this Court's *Webb's* opinion did not overrule "any federal court precedent" and that it could not be said that *Webb's* holding "was not clearly foreshadowed" because the Florida Supreme Court's decision upholding the statute (which this Court reversed in *Webb's* was apparently the first and only reported decision upholding such a statute.

Thus the Florida appellate court's analysis was that the unconstitutionality of the statute was an issue of first impression whose resolution *was not* clearly foreshadowed. On the other hand, the Court of Appeals' analysis was, in effect, that this Court's holding in *Webb's* (that the statute was unconstitutional) *was* clearly foreshadowed because

the supreme courts of two other states had, in 1964 and 1972, overturned similar statutes on constitutional grounds (although the Florida supreme court had upheld it). Clearly, there is a conflict in the analysis of this factor of the *Chevron* tests.

Turning to the second *Chevron* factor, the Florida appellate court in *Lockwood* concluded that retrospective operation of *Webb's* would neither further nor retard the rule of constitutional protection against deprivation of property without due process. Referring to this Court's decision in *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), the Florida court said that here, as in *Lemon*, even assuming arguendo a "taking,"the constitutional interests was implicated only once and under circumstances which will not recur because the statutory provisions had been not only declared unconstitutional but subsequently repealed by the Florida legislature. The court pointed out that plaintiffs in *Lockwood* had never questioned the constitutionality of the statute during the time that their funds were deposited in court, nor during the pendency of the litigation pursuant to which the deposits were made, nor when they were ultimately determined to be the owners of the principal deposited. Thus, unlike the complaining parties in *Webb's*, the *Lockwood* plaintiffs did not evidence a belief that their constitutional rights were being violated until long after the litigation in which the deposits were made had been concluded. Further, the court said, if the clerk had not invested the funds pursuant to the statute, no interests would ever have been earned and thus no property subject to a taking would ever have existed. As a result, the plaintiffs were, in the court's view, in precisely the same position they would have been in had the statute never been enacted -- without interest on the deposited

funds -- and thus retrospective operation of *Webb's* had "no measurable effect on the constitutional interest in question."

On the other hand, the Court of Appeals' analysis of the second *Chevron* factor is different. The Court of Appeals said that Petitioners' argument -- that the purpose of *Webb's* was accomplished with the legislative repeal of the offensive language of the statute --was not persuasive. The court said that the gist of *Webb's* was that interest on deposited funds belonged to the people ultimately found to be entitled to those funds, and not to the county; thus, when the clerk or the county spent those funds, they spent money which was not theirs, and it was not sufficient that "current or future" depositors would not lose money. Said the court, "The best way to further the *Beckwith* ruling is to restore already confiscated money to those people to whom the Supreme Court has said it belongs."

Again, the conflict is evident. The Florida court felt that the second *Chevron* factor was met by prospective-only application of *Webb's*. Using the same analysis this Court used in *Lemon*, the Florida court was of the opinion that the rule would in fact neither be furthered nor retarded by retrospective operation of *Webb's* because the statutory language had been repealed and the taking, if assumed, could not happen again. thus, to apply it retroactively would not advance or retard the rule of *Webb's*. The Court of Appeals, in contrast to the Florida court, disagreed. It was of the opinion that the "best way" to further *Webb's* was to require Petitioners to restore money to Respondents, in essence. With all due respect to the Court of Appeals, while this might be a just and fair result, it is not what this Court meant when in *Chevron* it used the

words "further or retard" the operation of the rule. There is, in fact, *nothing* to "further or retard" any longer, for this Court has spoken on the constitutionality of the statutory language and the Florida legislature has responded by repealing that language forever.

Finally, on the third *Chevron* factor, the Florida District Court of Appeal in *Lockwood* stated that *Webb's*, if applied retroactively, would "produce injustice and hardship on the clerk and county by mandating the return of monies long since expended." [It should be noted that the opinion of the court as reproduced in the Southern Reporter, Second Series, contains a typographical error. The work "preclude" appears instead of "produce" in the portion just quoted. Counsel for all parties in that case agreed that this was an error and, although West Publishing Company was notified, the error was never corrected. The slip opinion issued from the court clearly shows the word "produce" here, and it is obvious from context that the word "preclude" is not consonant with the court's holding in *Lockwood*.] By contrast, there was no injustice or hardship on the part of the *Lockwood* plaintiffs if the moneys were not ordered to be paid over to them, for the simple reason that they were in the same position they would have occupied had the statute never been enacted and they had the principal, which was what they were entitled to both before and after operation of the statute. Thus, the trial court's order dismissing the plaintiffs' complaint with prejudice was affirmed. (It should be noted here that the procedural posture in *Lockwood* was precisely the same as the procedural posture of this case when it came to the Court of Appeals below: there had been no discovery, no evidence had been taken, and the court was ruling on a *motion to dismiss* – not a motion for summary judgment.)

Conflict is again apparent when the Florida court's holding is compared with that of the Court of Appeals on the same question. The Court of Appeals noted that although the District Court had felt that "it could well work a hardship on the court clerk if the moneys were required to be returned at this time," the District Court had in fact held no hearing on the matter and there was no evidence in the record to support this conclusion. The Court of Appeals said that *substantial* inequity must be shown, and there was no evidence offered by Petitioners to show substantial inequity. In so holding, the Court of Appeals placed an incorrect construction on the third *Chevron* factor. This Court said in Chevron that nonretroactivity was indicated where "a decision of this Court *could* produce substantial inequitable results." (Emphasis supplied.) The Court of Appeals has translated this into a requirement that a showing of substantial inequity *must* be shown -- i.e., that Petitioners had to show that retroactive application of *Webb's would* produce substantial inequitable results. In so doing, the Court of Appeals significantly expanded the third *Chevron* factor far beyond what this Court said in that case.

In any event, the Court of Appeals felt that the District Court had decided the issue of "substantial inequity" on the basis of "unsubstantiated speculation" and that such an important issue should not be so decided. However, the Court of Appeals recognized that repayment of the interest "might impose a heavy burden" on Florida counties since large sums of money were involved and a holding of retroactivity would "likely prompt similar suits involving similar claims throughout Florida." The Court of Appeals anticipated that critical inquiries would be "the risk of insolvency for local governments, the risk of deep cuts in

government services necessary to innocent citizens, and the risk of overtaxing innocent taxpayers." Despite its all but taking judicial notice of these risks and burdens, nonetheless, the Court of Appeals felt that an evidentiary hearing to prove the obvious was necessary. This is extraordinary: an evidentiary hearing on a motion to dismiss! In any case, there is clear conflict here. The Florida court did not feel that evidence was necessary to take notice of substantial inequity in requiring the clerk of court and/or the county to repay moneys long ago expended, because the inequity in requiring such a course of action was not only substantial but obvious. The Court of Appeals, on the other hand, directed that inquiries into the obvious were required.

Furthermore, such inquiries would be largely rhetorical: What does "insolvency" mean? Does it mean total 'bankruptcy"? How does one prove "risk of insolvency"? What *is* a "risk" of insolvency? Does it have to be a *substantial* likelihood or only a reasonable probability? What are "deep cuts in government services necessary to innocent citizens"? What if there are cuts in such services but those cuts are not considered by the District Court or the Court of Appeals to be "deep"? What is meant by "overtaxing innocent taxpayers"? All taxpayers feel they are overtaxed! There is in truth no quantifiable measure of yardstick for determining "substantiial inequity" as a matter of facts to be proven. "Substantial" is a legal term that is necessarily determined as a matter of law from the basis of the facts and circumstances of a case; there is no legal line to which one can point which divides "substantial inequity" from "inequity." That is the kind of determination judges -- not juries -- must make all the time. They know it when they see it, in other words, and the District Judge

below knew substantial inequity when he saw it. There is no sound reason whatsoever why Petitioners should be required to *prove* substantial inequity. Their burden is only a burden of persuasion. *Cash v. Califano*, 621 F.2d 626 (4th Cir. 1980). It is not, as the Court of Appeals has by fiat elevated it, a burden of *proof*. "Proof" implies evidence; "persuasion" does not.

It is, accordingly, urged that the decision of the Court of Appeals is wholly in conflict with a decision on the same federal question rendered by a state court of last resort, and that certiorari from this Court is appropriate to settle the matter.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a Writ of Certiorari and review the decision of the Court of Appeals below.

Respectfully submitted,

JOHN C. RANDOLPH, of
Johnston, Sasser, Randolph
& Weaver
Post Office Box M
West Palm Beach, Florida 33402
(305) 655-0108
For Petitioner DUNKLE

RICHARD A. GRADDOCK
Chief Deputy County Attorney
Post Office Box 1989
West Palm Beach, Florida 33402
(305) 820-2225
For Petitioner PALM BEACH COUNTY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for a Writ of Certiorari had been furnished by regular United States mail to LEON ST. JOHN, Esq., and ROD TENNYSON, Esq., of Powell, Tennyson, and St. John, P.A., 325-C Clematis Street, West Palm Beach, Florida 33401, Attorneys for Respondents, on this 28TH day of April, 1987.

JOHN C. RANDOLPH, of
Johnston, Sasser, Randolph
& Weaver
Posts Office Box M
West Palm Beach, Florida 33402
(305) 655-0108
For Petitioner DUNKLE

APPENDIX A

CAMDEN I. CONDOMINIUM ASSOCIATION, INC., Camden L. Condominium Association, Inc., Cambridge A. Condominium Association, Inc., Cambridge I. Condominium Association, Inc., et al., Plaintiffs-Appellants,

v

John B. Dunkle, etc., et al., Defendants-Appellees.

No. 86-5144

United States Court of Appeals,
Eleventh Circuit.

Dec. 18, 1986.
Rehearing and Rehearing En Banc
Denied Jan. 28, 1987

- - - - -

Appeal from the United States District Court
for the Southern District of Florida.

- - - - -

Before CLARK, EDMONDSON and KEITH *
Circuit Judges.

EDMONDSON, Circuit Judge:

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* Honorable Damon J. Keith, U.S. Cirucit Judge for the Sixth Circuit, sitting by designation.

This case deals with the retroactivity of a United States Supreme Court decision invalidating a state law. According to Fla.Stat.Ann. sec. 28.33 (West 1974), all interest earned on funds deposited in court registries was deemed to be income of the office of the clerk of each court. The United States Supreme Court declared that statute unconstitutional in 1981.

Plaintiffs/appellants filed this action in the United States District Court for the Southern District of Florida, seeking recovery of interest paid on funds deposited prior to 1981 with the clerk of the court of Palm Beach County, Florida. The district court granted defendants' motion to dismiss, holding that the Supreme Court decision invalidating the statute did not apply to funds deposited before the date of the decision. Plantiffs appealed to this court. We vacate and remand for further proceedings.

FACTS

Plaintiffs in this case were at one time parties to court proceedings in Palm Beach County, Florida. Allegedly, plaintiffs deposited funds with the clerk of the court of that county, pursuant to certain Florida statutes.[1] The clerk then deposited those funds in an interest-bearing account. According to Fla.Stat.Ann. sec. 28.33 (West 1974),

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[1]It is not clear from the pleadings in this case exactly which Florida statutes were involved in those earlier proceedings.

the interest was public income.[2]

In 1981, the United States Supreme Court held that Fla.Stat.Ann. sec. 28.33 was an unconstitutional taking of private property. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980). The Florida Legislature later amended the statute.[3]

Plaintiffs filed suit in May, 1983, seeking recovery of the interest paid on funds that they had deposited in the Palm Beach County court registry before the date of the *Beckwith* decision. Defendants filed a motion to dismiss the case, which plaintiffs answered. In July, 1983, plaintiffs filed a motion to certify the case as a class action. The district court never ruled on that motion. On January 30, 1986, the district court, without conducting an evidentiary hearing, granted the defendants' motion to dismiss the case. The court based its decision on a finding that *Beckwith* should not be applied retroactively. This appeal followed.

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[2]Section 28.33 provided: "All interests accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the same accounts as are other fees and commissions of the clerk's office." Fla.Stat.Ann. sec. 28.33 (West 1974).

[3]Section 28.33 was amended to read, "Except for interest earned on moneys deposited in the registry of the court, all interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the same account as are other fees and commissions of the clerk's office." 1982 Fla.Laws c. 82-117, sec. 1, *codified at* Fla.Stat.Ann. sec. 28.33 (West Supp.1983).

DISCUSSION

The sole questsion on appeal is whether the holding in *Beckwith* should be applied retroactively. Our analysis of this issue must begin with *Chevron Oil Co. v. Huson.* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), which set out the framework for determining retroactivity in civil cases. In that case, the Supreme Court noted the strong presumption that judicial decisions are retroactive and set out the three factors that mitigate against retroactivity:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-07, 92 S.Ct. at 355 (citations omitted). The party seeking to avoid retroactive application has the burden of persuasion. *Cash v. Califano,* 621 F.2d 626, 629 (4th Cir. 1980); *cf. EEOC v. Atlanta Gas Light Co.,* 751 F.2d 1188 (11th Cir.), *cert. denied,* --- U.S. ---, 106 S.Ct.333, 88 L.Ed.2d 316 (1985).

In analyzing the first *Chevron* factor, we note that it

may not have been wholly unreasonable for the county clerk to rely on the statutes, which were presumptively constitutional when enacted, and one of which was upheld by Florida's state supreme court. *See generally Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So.2d 951 (Fla. 1979), *rev'd*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980). This reliance, however, weighs lightly against retroactivity. The statutes did not require the county clerks to invest the funds and appropriate the interest; the statutes only authorized the clerks to do so. Consequently, each clerk who elected to collect interest assumed the risk that these statutes would ultimately be found unconstitutional. Moreover, when section 74.051 became effective in 1965, at least one state's highest court had already found a similar statute to violate the federal Constitution. *McMillan v. Robeson County*, 262 N.C. 413, 137 S.E.2d 105 (1964). In 1972, one year before the effective date of section 28.33, another state supreme court struck down another such statute as contrary to the federal Constitution. *Sellers v. Harris County*, 483 S.W.2d 242 (Tex.1972).

The United States Supreme Court's opinion in *Beckwith*, which reversed the Florida state supreme court, did not overrule any federal court precedent. Nor can we say that the holding in *Beckwith* was not clearly foreshadowed. The Florida high court's decision validating the pertinent statute was apparently the first and only reported decision upholding such statutes appropriating interest on deposited funds. *See generally McMillan v. Robeson County*, 262 N.C. 413, 137 S.E.2d 105 (1964); *Sellers v. Harris County*, 483 S.W.2d 242 (Tex.1972).

The Supreme Court in *Beckwith* recognized that, "[t]he usual and general rule is that any interest on an

inter-pleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Beckwith* 449 U.S. at 162, 101 S.Ct. at 451. *See also, Phillips Petroleum Co. V. Hazlewood,* 534 F.2d 61 (5th Cir.1976);[4] *James Talcott, Inc. v. Allahabad Bank, Ltd.,* 444 F.2d 451 (5th Cir.), *cert. denied,* 404 U.S. 940, 92 S.Ct. 280, 30 L.Ed.2d 253 (1971); *Globe Indemnity Co. v.Puget Sound Co.,* 154 F.2d 249 (2d Cir. 1946). *Cf. Hatch v. Minot,* 369 So.2d 974 (Fla.App.) (payment of funds to proper party may include interest because retention of funds has benefitted party who has held it and injured party to whom it is owed), *cert. dismissed,* 373 So.2d 458 (Fla. 1979). In short, nothing in the *Beckwith* opinion "indicated that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by [that Court]." *Hanover Shoe, Inc. v. United Shoe Mach. Corp.,* 392 U.S. 481, 496, 88 S.Ct. 2224, 2233, 20 L.Ed.2d 1231 (1968).

The second inquiry is whether the purpose of the *Beckwith* rule will be furthered or retarded by prospective application of the holding. The defendants argue that because the offensive language of section 28.33 has been deleted from the statute, the purpose of *Beckwith* has been accomplished. This argument is not persuasive. The gist of *Beckwith* was that all interests earned on all deposited money belonged not to the county, but to those people ultimately held to be the owners of the deposited funds. When Florida counties spent money received under the old

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[4] In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), this court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

statutes, they spent money that did not belong to them. It is not sufficient that current or future depositors will not lose money. The best way to further the *Beckwith* ruling is to restore already confiscated money to those people to whom the Supreme Court has said it belongs.

The final factor is whether retroactivity would cause substantial inequitable results. Because the reliance factor and the purpose factor weigh lightly for prospective application, this final factor will determine if *Beckwith* is to be applied only prospectively. The district court held that "it could well work a hardship on the court clerk if the moneys were required to be returned at this time"; however, the court held no hearing on the matter, and the record is devoid of any evidence supporting this conclusion.

We recognize that repayment of the interest might impose a heavy burden, not only on Palm Beach County, but on every other county in Florida. The interest provisions of the pertinent statutes have been in effect for many years. In this case alone, plaintiffs claim that they are due a refund in excess of one million dollars. A holding of retroactivity in this case would likely prompt similar suits involving similar claims throughout Florida.

Some potential economic hardship, however, would not necessarily preclude retroactive application of *Beckwith*. Retroactive application is precluded only when necessary to prevent *substantial* inequity. *Willaims v. City of Atlanta*, 794 F.2d 624, 628 (11th Cir. 1986); *cf. Acoff v. Abston*, 762 F.2d 1543, 1548 n. 6 (11th Cir. 1985). Examples of such substantial inequity include: (1) infringement on the property rights of innocent parties, *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1987, 1900-01,

23 L.Ed.2d 647 (1969); *EEOC v. Atlanta Gas Light Co.*, 751 F.2d 1188, 1191 (11th Cir.), *cert. denied*, --- U.S. --, 106 S.Ct. 333, 88 L.Ed.2d 316 (1985); (2) denial of access to the courts, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 108, 92 S.Ct. 349, 356, 30 L.Ed.2d 296 (1971); (3) double payment, *Morrison, Inc. v. Donovan*, 700 F.2d 1374 (11th Cir. 1983); and (4) substantial risk of insolvency. *Cf. Atlanta Gas Light Co.*, 751 F.2d at 1191.

Defendants have presented no evidence of substantial inequities, and we decline to allow the important issue in this case to be decided on the basis of unsubstantiated speculation. We anticipate that the risk of insolvency for local government, the risk of deep cuts in government services necessary to innocent citizens, and the risk of overtaxing innocent taxpayers are critical inquiries in this case; but other matters may also be relevant.

Accordingly, we VACATE the judgment of the district court and REMAND this case for consideration of the burden that retroactive application of *Beckwith* would place, in fact, on Florida local governments and for other proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5144

CAMDEN I. CONDOMINIUM ASSOCIATION, INC., et al.,

Plaintiffs-Appellants,

versus

JOHN B. DUNKLE, etc., et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING

(January 28, 1987)

BEFORE: CLARK, EDMONDSON and KEITH*, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellee, Palm Beach County, is denied.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson

United States Circuit Judge

*Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

REHG-4
(Rev.9/85)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5144

CAMDEN I. CONDOMINIUM ASSOCIATION, INC., et al.,

Plaintiffs-Appellants,

versus

JOHN B. DUNKLE, etc., et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 18, 1986, 11 Cir., 198__, ____F.2d____).

(January 28, 1987)

BEFORE: CLARK, EDMONDSON and KEITH*, Circuit Judges.

PER CURIAM:

(XX) The Petition for Rehearing is DENIED and no member of this appeal nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en bank, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson

United States Circuit Judge

*Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

REHG-6
(Rev.6/82)

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 83-8265-CIV-PAINE

CAMDEN, I CONDOMINIUM ASSOCIATION, INC., et al.,
Plaintiffs,

ORDER OF DISMISSAL

vs.

JOHN B. DUNKLE, et al.,
Defendants.

THIS CAUSE arises before the Court upon the Defendants' motion to dismiss.

Accordingly, after a careful review of the record, and the Court otherwise being fully advised in the premises, the Court finds:

FACTS

The Plaintiffs in this case are a group of condominium associations which were involved in litigation in Palm Beach County Florida. During the course of this litigation the Plaintiffs deposited sums of money into the state courts registry with the Defendants. The Defendant John B. Dunkle clerk of the county court invested these deposits in interest bearing accounts as directed by Florida Statute. Fla. Stat. sec.28.33. It is the interest earned on these funds deposited with the clerk of the Florida state court that is the subject of this litigation.

Florida Statute sec. 28.33 was enacted by the Florida legislature for the express purpose of allowing the clerks of the Florida state courts to invest monies deposited with the courts in interest bearing accounts. The interest earned on these accounts was to be utilized by the clerks to defray the expenses of the operation of their respective offices. The constitutionality of this statute was challenged in *WEBB'S FABULOUS PHARMACIES vs. BECKWITH,* 449 U.S. 155, 66 L.Ed.2d 358, 101 S.Ct. 446 (1980). The Supreme Court held that the statute constituted an unconstitutional taking of property under the Fifth and Fourteenth Amendments to the United States Constitution.

In *WEBB* the depositors claimed a right to the interest from the outset. The state trial judge reserved ruling on the issue until after trial. At the conclusion of the trial the judge held that the interest belonged to the parites, the clerk took an appeal which was heard by the Florida Supreme Court. The Florida Supreme Court held that the statute was constitutional. The United States Supreme Court reversed and held the statute to be unconstitutional. *WEBB* supra.

The plaintiffs now claim that the invalidation of the statute in *WEBB* should be given a retroactive effect so they might recover the interest earned on their deposits. This Court notes that the Plaintiffs failed to make any claims to the interest earned on these funds during the state court proceeding.

MEMORANDUM

"Generally, a decision which changes existing law or policy is given retroactive effect unless retroactive

application would cause manifest injustice." *N.L.R.B. vs. LYON & RYAN FORD,* 647 F.2d 745 (1981), citing *CHEVRON OIL CO. vs. HUSON,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Clearly the decision in *WEBB* changed existing Florida law. The question presented in this case is should the application of *WEBB* be given retroactive effect so that the Plaintiffs in the case at bar may recover the interest earned by the clerk on their deposit.

The Supreme Court in *CHEVRON* supra. set out a three prong test to determine whether a decision should be given prospective application only.

1. Does the decision establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed?

2. Considering the prior history of the rule in question, its purpose and effect does retroactive application further or retard the operation of the rule.

3. Does retroactive application create injustice or hardship for one of the parites.

The Florida Fourth District Court of Appeals recently addressed this issue in the case of *INTERNATIONAL STUDIO APARTMENT ASSOCIATION INC. vs. LOCKWOOD* 421 So.2d 1119 (Fla. 4th D.C.A. 1982). In *LOCKWOOD* the court was faced with a fact situation squarely on point with the case at bar. The *LOCKWOOD* court after an application of the *CHEVRON* test, concluded that the decision in *WEBB* should not be given retroactive effect.

Applying the *CHEVRON* test to the case at bar this Court is of the opinion that the decision in *WEBB* should be given a prospective interpretation only. The clerk on the Palm Beach County Court reasonably relied on the validity of the statute and the Plaintiff made no claim to interest earned on the account which would have put the clerk on notice of a dispute until well after the conclusion of the litigation. Clearly the decision in *WEBB* established new law by overruling past precedent. Thus the first prong of the *CHEVRON* test is satisfied. The constitutional protection afforded the Plaintiff by the Fifth and Fourteenth would not be furthered or retarded by the retroactive application of the *WEBB* case, thus the second prong of the test is met. Finally it could well work a hardship on the court clerk if the monies were required to be returned at this time. The money would never have been earned but for the statute and it is long past spent. The Plaintiff failed to raise the issue of the interest in the state court and is in the exact position they would have been in had the statute not been in affect. The statute has now been held invalid and all future depositors are thus protected.

Accordingly it is ORDERED AND ADJUDGED that the Defendants' motion to dismiss be and hereby is GRANTED, with prejudice.

DONE and ORDERED in chambers at the United States Courthouse, Federal Courthouse Square, Miami, Florida this 29th day of January 1986.

/s/ James Lawrence King

JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF
FLORIDA

cc:counsel

APPENDIX D

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1982

INTERNATIONAL STUDIO APARTMENT ASSOCIATION, INC., and ROYAL COAST CONDOMINIUM ASSOCIATION, INC., Florida corporations not for profit,	)	
Appellants,	)	
v.	)	CASE NO. 81-1998.
ROBERT E. LOCKWOOD, etc., et al.,	)	
Appellees.	)	

Opinion filed November 24, 1982

Appeal from the Circuit Court for Broward County; Barbara Bridge, Judge.

Rod Tennyson and David St. John of Powell, Tennyson & St. John, P.A., West Palm Beach, for appellants.

Harry A. Stewart, General Counsel, and Alexander Cocalis, Deputy General Counsel, for Broward County, Fort Lauderdale, for appellees.

Charles F. Schoech, County Attorney, and David M. Wolpin, Assistant County Attorney, West Palm Beach, for Palm Beach County as amicus curiae.

HERSEY, J.

Appellant non-profit corporations filed a class action suit against Broward County and the Clerk of the Circuit Court of the Seventeenth Judicial Circuit. The gravamen of their complaint was that litigants who had deposited money in the registry of the circuit court were entitled, upon prevailing in the litigation which occasioned that deposit, to be paid the interest which had accrued on the deposit while the litigation was pending. This appeal was brought from an order dismissing with prejudice an amended complaint requesting that relief.

The initial deposits in the registry of the court by members of the class were apparently made in accordance with Section 718.401(4), Florida Statutes (1977), since the related litigation arose out of disputes involving condominium recreation area leases. The statute permitted members of the class to pay rent due under such leases into the registry of the court pending resolution of the dispute and prevented the lessor from taking action to disposses or otherwise penalize defaulting tenant/class members provided rent payments were timely paid into the registry.

Another statute, Section 28.33, Florida Statutes (1977), authorized the clerk of the circuit court to invest funds deposited into the registry of the courts and provided that interest earned in this fashion would be deemed income of the office of the clerk of the circuit court. This latter statute was tested and declared constitutional by the Florida Supreme Court in *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So.2d 951 (Fla. 1979). Thereafter, however, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 445 U.S. 925, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), that aspect of the statute which permitted the clerk to retain the income earned on deposited funds was declared unconstitutional. On remand the Florida Supreme

Court further declared unconstitutional the portion of the statute authorizing the clerk to invest deposited funds. *Beckwith*, 394 So.2d 1009 (Fla. 1981).

The present suit was brought to test whether the holding of unconstitutionality in Webb's, 445 U.S. at 925, would be applied retrospectively, to permit appellants to recover interest accrued during the pendency of the recreation area lease litigation, or prospectively only. The trial court determined that the holding should have only prospective effect. We agree.

The general rule is that judicial decisions in the area of civil litigation have retrospective as well as prospective application, subject to a well established exception which our supreme court carefully analyzed in *Florida Forest and Park Service v. Strickland*, 18 So.2d 251 (Fla. 1944).

> [W]here a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation. See 14 Am.Jur.p.345, Sec. 130; 21 C.J.S., Courts, p. 329, § 194, subsec. b. Based upon a recognition of this commonsense exception to the rule, some of the courts have gone so far as to adopt the view that the rights, positions, and courses of action of parties who have acted in conformity with, and in reliance upon, the construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change in judicial construction of the same statute made by a subsequent decision of the same court overruling its former decision. Accordingly, such courts have given to such

> overruling decisions a prospective operation only, in the same manner as though the new construction had been added to the statute by legislative amendment.

Id. at 253.

From 1973 until 1980 parties litigant deposited funds in the registry of Florida courts and the clerks invested those funds and disposed of investment income in reliance on the statute which, in 1979, was stamped with the imprimatur of the Supreme Court of Florida. Had the 1980 decision declaring the statute unconstitutional emanated from the Florida Supreme Court rather than the Supreme Court of the United States, it would have qualified as an "overruling decisions" and the exception permitting prospective operation only would have applied. Certainly the public policy considerations which created the impetus for the establishment of the "prospective operation only" exception in the first instance apply with no less compelling force where the "court of supreme jurisdiction" takes its authority form the federal rather than a state constitution. In view of the fact that neither the Supreme Court of the United States nor the Florida Supreme Court specifically addressed the isssue, we conclude that in the absence of a superior and compelling federal principle, the "prospective operation only" exception should be applied in situations such as those represented by the present case.

Further, there is at least a hint in the Florida Supreme Court's earlier decision upholding the constitutionality of the statute that at least that court (Florida Supreme Court) would apply such a ruling only prospectively. The trial court in *Webb's* invalidated the Statute. Upon direct appeal the Florida Supreme Court reversed the

trial court and upheld the statute. Interestingly, in doing so, the court specifically ruled that its decision would "apply in this case and in all cases where deposits of funds are made after the effective date of this opinion." In other words the ruling was given prospective effect only. Although no reasons were given for doing so, it seems apparent that the court was concerned that others may have relied on the trial court ruling invalidating the statute. Surely, if persons who have relied on the invalidity of a state statute are to be protected, it would make no sense to afford less protection to those who have acted in good faith reliance on the validity of the statute.

Turning then to an examination of the federal precedent, *Chevron Oil Company v. Huson*, 404 U.S. 106, 92 S.Ct. 349 (1971), promulgated a three phase test which is applied to determine whether a decision should have retractive effect. Formulating that test the court stated:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see *e.g.*, Hanover Shoe, Inc. v. United Show Machinery Corp., *supra*, 392 U.S., at 496, 88 S.Ct., at 2233, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g.*, Allen v. State Board of Elections, *supra*, 393 U.S., at 572, 89 S.Ct., at 835. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, *supra*, 381 U.S., at 629, 85 S.Ct., at 1738. Finally, we have weighd the inequity imposed by retroactive application,

> for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v. City of Houma, *supra*, 395 U.S., at 706, 89 S.Ct. at 1900.

Id. at 106-07. It is important to note that all three tests must be met. *Valencia v. Anderson Brothers Ford*, 617 F.2d 1278 (7th Cir. 1980); *N.L.R.B. v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745 (7th Cir. 1981). In refining the first factor, the supreme court noted the difficulty of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded in the old. *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463 (1973). According to the court,

> We have approved nonretroactive relief in civil litigation, relating, for example, to the validity of municipal financing founded upon electoral procedures later declared unconstitutional, Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969), and City of Phoenix, Arizonia v. Kolodziejski, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 235 (1970); or to the validity of elections for local officials held under possibly discriminatory voting laws, Allen v. States Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969). In each of these cases, the common request was that we should reach back to disturb or to attach legal consequence to patterns of conduct premised either on unlawful statutes or on a different understanding of the controlling [sic: effort?] of judge-made law from the rule that ultimately prevailed.

Id. at 197-198.

The court then stated, "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing the doctrine of nonretroactivity." *Id.* at 199.

In the instant case, the litigants, particularly appellees, relied upon section 28.33 without question. Thus, the unconstitutionality of the statute was an issue of first impression (in *Webb's Fabulous Pharmacies)* whose resolution was not clearly foreshadowed. More specifically, the clerk of the circuit court in this case, pursuant to section 28.33 invested the funds deposited by litigants into the court registry and, in reliance on section 28.33, retained the interest earned, using it for the operation of his office and turning over any balance to the Board of County Commissioners.

In our view retrospective operation of *Webb's Fabulous Pharamacies* will neither further nor retard the rule (constitutional protection against deprivation of property without due process), so that the second factor in the *Chevron* test is similarly satisfied. As stated in *Lemon,* 411 U.S. at 201-02, which dealt with the question of retroactive application of a decision holding a statutory program to reimburse nonpublic sectarian schools for certain secular educational services unconstitutional:

> The sensive values of the Religion Clauses do not readily lend themselves to quantification but, despite the inescapable imprecision, we think it is clear that the proposed distribution of state funds to Pennsylvanis's nonpublic sectarian schools will not substantially undermine the constitutional interests at stake in *Lemon I* . . . .

> . . . Second, there is the question of impinging on the Religion Clauses from the fact of any payment that provides any state assistance or aid to sectarian schools – the issue we do not reach in *Lemon I.* Yet even assuming a cognizable constitutional interest in barring any state payments, under the District Court holding that interest is implicated only once under special circumstances that will not recur.

Here, as in *Lemon,* even if for the sake of argument a taking is assumed, the constitutional interest is implicated only once and under circumstances that will not recur, the statute having been effectively eliminated. In determining whether nonretroactive application of *Webb's* will undetermine the constitutional interest at stake, it is important to consider the exact nature of that constitutional interest in relation to the present case. First, appellants apparantly never questioned the constitutionality of section 28.33 either at the time the funds were deposited in the court registry, during the pendency of the claim, or when they were ultimately determined did not evidence a belief that any constitutional rights were being violated as did the parties in *Webb's.* Further, had the clerk not invested the funds pursuant to the statute, there would have been no interest earned and therefore no "property" subject to a "taking." Accordingly, appellants are in the same position they would have been in had the statute not been in existence -- without interest on the deposited funds -- thus retrospective operation of *Webb's* has no measurable effect on the constitutional interest in question.

Lastly, if applied retroactively, *Webb's* could produce injustice and hardship on the clerk and county by mandating the return of monies long since expended. In this regard this case is strikingly similar to the

circumstances present in *Gulesian v. Dade County School Board*, 201 So.2d 325 (Fla. 1973), wherein the court refused to order a refund of taxes collected in good faith by the school board under a presumptively valid state statute which was subsequently judicially invalidated. Appellants, on the other hand, are now in the same position as if the statute had never been in operation. Thus, even though retention of the interest earned was characterized as a taking in *Webb's*, appellants suffer no hardship or injustice since they have the principal, the amount to which they were entitled both before and after operation of the statute.

Concluding, we point out that neither the Florida Supreme Court nor the Supreme Court of the United States spoke to the issue of whether the unconstitutionality of section 28.33 was to be given retroactive effect. Application of the analagous Florida rule and the specific federal rule each produces the identical result. Based upon the principles derived from both federal and Florida precedent we affirm the order dismissing appellants' amended complaint with prejudice.

AFFIRMED.

DOWNEY and ANSTEAD, JJ., concur.